***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 74-1414

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

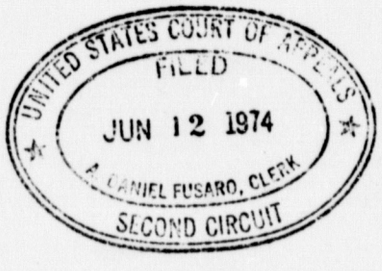
SPENCER THOMAS CHIN,

Appellant.

Docket No. 74-1414

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTION PRESENTED

Whether appellant was denied his Sixth Amendment right to counsel of his own choosing by the District Court's failure to grant an adjournment of the sentencing proceeding.

## STATEMENT PURSUANT TO RULE 28(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler, Chief Judge) entered on March 29, 1974, convicting appellant, after a plea of guilty, of one count of bank robbery, in violation of 18 U.S.C. §2113 (a), and sentencing him to fifteen years' imprisonment.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

### Statement of Facts

Appellant was charged with bank robbery and bank robbery while armed.* On November 27, 1973, with assigned counsel of The Legal Aid Society, Federal Defender Services Unit, appellant appeared before Judge Mishler who, at the request of appellant, adjourned the proceedings to January 14, 1974.

On January 11, 1974, appellant sought to enter a plea of guilty, but since he did not acknowledge that money was taken, Judge Mishler refused to accept the plea.

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*The indictment is B to appellant's separate appendix.

On January 15, 1974, counsel requested a hearing under Miranda v. Arizona, 384 U.S. 436 (1966). Appellant made his own application for a bill of particulars and discovery. Appellant stated that he had not taken up the matter with his assigned Legal Aid Society attorney (T.4*). Appellant indicated that for his legal assistance he had relied upon people at Harvard [or Howard] University (T.5).

The Legal Aid Society attorney indicated that she was satisfied with the discovery given in response to the motion (T.4), but appellant indicated he did not know anything about what the Legal Aid Society attorney had obtained.

Appellant requested the bank surveillance photographs, and they were given to him (T.6).

Appellant then requested permission to have Joseph Smith appear as advisory counsel. Mr. Smith was a lawyer in custody at the Rikers Island Correctional Facility. Judge Mishler denied the motion (T.7).

The Legal Aid Society attorney then advised the court that appellant had been receiving advice from people at Howard University (T.7). Judge Mishler stated that the students could not be lawyers, but could come in on their own and consult informally (T.7). Appellant indicated that the person he wanted was a lawyer (T.8).

After the Miranda hearing, at which the Government

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*Numerals in parentheses preceded by "T" are references to the transcript of the January 15, 1974, proceeding.

presented the testimony of one witness, and at which appellant did not testify, Judge Mishler found the statements had been properly obtained (T.20).

At the trial, the Government called as witnesses Rose Pass, Charles Wynter, Oliver Smith, and Charles Gahn, all bank employees; and New York City Police Officer George R. Pajonas, who arrested appellant at the bank (T.67).

In the midst of Mr. Gahn's testimony, Legal Aid Society counsel requested a bench conference at which she indicated appellant's desire to plead guilty (T.88). The Government agreed to accept a plea of guilty to the armed robbery count of the indictment (T.90). Judge Mishler conditioned acceptance of the plea on the presentation of the Government's full case and a sworn statement by appellant (T.90).

FBI Agent Doyle then testified as to the oral admission of the bank robbery made by appellant (T.100-03).

Appellant, on examination by Legal Aid Society counsel, stated that he was asked to participate in the robbery by two others (108) and agreed to do so. The other two participants carried weapons (109). During the robbery one of the others was throwing the money from the teller's cage. A bank employee appeared and shot and killed the robber throwing the money. Appellant stated he was trying to collect the money but coulan't do so because he had no bag.* He

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*This is contrary to government testimony that appellant had $3,500 on his person at the time of his arrest (T.67).

acknowledged that he had $500 on his person, but stated it was his own money. Appellant stated that, based on the bank photographs, he understood that his accomplice had some of the bank's money on his person.

Judge Mishler then advised appellant that he could plead guilty to armed robbery as an aider and abettor, advised him of his right to trial, and inquired if he wished to plead guilty. Appellant indicated he had discussed the plea with his Legal Aid Society lawyer and knew the maximum possible sentence was twenty-five years' imprisonment and a $10,000-fine (119).

The court then accepted the plea of guilty to armed robbery.

At the beginning of the sentencing proceeding, which was set for March 29, 1974, Legal Aid Society counsel requested an adjournment of the proceeding because appellant did not have certain papers he needed to make his presentation (S.3*). These papers, prepared by lawyers who were unable to be in court because of other commitments, were misplaced during the disturbance at Federal Detention Headquarters at West Street on March 21, 1974 (S.3). Appellant declined to advise the court of the nature of the contents of those papers (S.4) or to expose his strategies and tactics. He explained that his legal advisers had told him to go to trial

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*Numerals in parentheses preceded by "S" are references to pages of the transcript of the sentencing proceeding.

to find out the contents of the Government's case and then to plead guilty (S.7). This, he said, is what he did (S.7). Appellant explained that "the whole thing is with himself right now because the lawyers were tied down from the beginning" (S.11).

Appellant requested an adjournment to the following Thursday, during which time he could confer with his advisers (S.13). He indicated that he felt it necessary to speak with them about certain advice they had given him (S. 14). Appellant asserted that if he were unable to speak to his lawyers he would be unable to have the legal advice he chose (S.15). Defense counsel then requested an adjournment so that appellant might speak to his other lawyers and perhaps have one of them appear on the adjourned date (S.16).

The Judge denied the motion, saying that the delay in sentencing had been long enough, that the sentence should be imposed within two or three weeks of the plea, and that even that delay was caused by the length of time needed to prepare the pre-sentence report. In denying the adjournment, the Court also considered appellant's participation in the West Street disturbance and concluded that he was "definitely a risk" (S.17).

The Court then gave Chin an opportunity to examine the pre-sentence report and to make a telephone call (S.18). The marshals were in attendance at this conversation and overheard it, including what they considered to be a deroga-

tory remark about the Judge.

After a forty-minute recess, a discussion took place about the pre-sentence report and the denial to appellant of counsel of his own choosing.

Simon Chrein, the Legal Aid Society attorney representing Mr. Chin at the sentencing proceeding, explained that the notice for sentence was received by The Legal Aid Society on March 22, 1974, and forwarded to appellant, and that the letter Mr. Chin sent on Sunday, March 24, to a Miss Burns was written without his knowledge of the March 29 sentencing date. Further, appellant indicated he had had no access to telephones during the period between March 21 and 29 (S.17).

Appellant stated that without an adjournment he would not have a lawyer of his own choosing -- something more than just legal assistance. Mr. Chrein reiterated appellant's request for a lawyer of his own choosing (S.23).

Judge Mishler ruled that appellant had had assigned counsel for pleading, trial, and withdrawal of the plea, and that he was not going to delay sentencing by asking for new counsel. However, Judge Mishler acknowledged that appellant did not have a lawyer of his own choosing (S.24).

After discussion of the pre-sentence report, appellant once again requested the presence of his lawyer -- of "the people who want to represent me" (S.29). Appellant sought to leave the courtrooom because he was denied his own

attorneys (S.29).

Judge Mishler imposed a fifteen-year term of imprisonment, without consideration of appellant's participation in the West Street disturbance (S.32).

## ARGUMENT

### THE DISTRICT COURT'S REFUSAL TO ADJOURN THE SENTENCING PROCEEDING DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF HIS OWN CHOICE.

On the unique facts in this case, the failure of the District Court to grant a reasonable, short adjournment of the sentencing procedure requested by appellant deprived him of his Sixth Amendment right to counsel of his own choosing. Crooker v. California, 357 U.S. 433 (1957); Chandler v. Fretag, 348 U.S. 3 (1954); Powell v. Alabama, 287 U.S. 45 (1932).

On the date of sentence, appellant told the Judge that certain papers he needed to make his presentation were missing, that he needed to confer with lawyers who had been advising him, and that he hadn't been able to contact those lawyers by telephone between the time he was notified of the sentencing date and the day of the sentencing proceeding because of the cut-off of telephone facilities at the Federal House of Detention.

From this record, it is clear that appellant did not consider the Legal Aid Society attorney his counsel, but that he had other counsel ready to assist him who had in fact provided him with advice throughout the proceedings. Thus, appellant not only had counsel, but apparently counsel

fully prepared to advise him and develop defense strategies.*

The only difficulty here, and the reason for the requested delay, was that appellant could not reach the persons he considered to be his attorneys in sufficient time to work out certain existing questions about the sentencing. Appellant explained that the lawyers were involved in other cases, but that through a Mr. Dougal he could reach them. He also explained, albeit inartfully, that he had been unable to reach the lawyers because he did not know until March 25 that the sentencing would be held on March 29, and he did not have the use of a telephone available to him.

The Judge refused to grant the adjournment, despite joinder in the request by Legal Aid Society counsel, because, said the Judge, sentencings are too long delayed by the wait for pre-sentence reports. The Judge added that he considered appellant a risk because of his involvement in a disturbance at Federal Detention Headquarters.

The denial of the adjournment here is not justified by the length of time needed to prepare the pre-sentence report, a chronic problem in the Eastern District of New York. The shortage of probation department personnel is simply irrelevant to the issue of whether appellant has a

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*This, then, is not the case where the defendant seeks a last minute change in counsel, desires an unjustifiable assignment of new counsel, or expresses unrealistic hopes of retaining counsel. See, e.g., United States ex rel. Jackson v. Follette, 425 F.2d 257, 259 (2d Cir. 1970); United States v. Llanes, 374 F.2d 712, 717 (2d Cir. 1970); United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965).

constitutional right to confer with his attorney.

The finding that appellant was a "risk" due to his participation in the prison disturbance was properly a consideration only in determining where to house appellant or how long to postpone the proceedings. Thus, the grant by the Court of permission for appellant to make a telephone call from the courthouse was entirely appropriate. However, the cure failed because the marshals were within hearing distance of the telephone and terminated the call after ten minutes, believing that was sufficient time for appellant to transact his business.*

That telephone call, and perhaps several others, might well have been the answer to the problem: appellant could have been given an opportunity to confer with counsel and the Court could have limited the period of adjournment. Nonetheless, no private conversation was permitted, and appellant therefore could not obtain his information at all or in confidence.

The critical proceeding for appellant in this case was the sentencing. Advice given to him by his counsel for the prior proceedings might not have related to the sentencing, and the defense posture at sentencing might well have been premised on a new approach. Indeed, lack of communica-

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*The marshals, overhearing the conversation, reported they heard what they believed to be a threat to the Judge. The marshal stated, however, the call was cut off because ten minutes had gone by.

tion between appellant and his attorneys might well have produced the suspicion, distrust, and secretiveness manifested by appellant in the courtroom.

With minimal disruption of the court proceedings, and without loss of judicial control, the legitimate request of appellant could have been satisfied, and it was error not to have provided for the small amount of time needed.

## CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new sentencing proceeding.

Respectfully submitted,

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Certificate of Service

June 12, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Skloot Bamberger